

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY  
BRANCH 05

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STATE OF WISCONSIN,

Plaintiff, JURY VERDICT  
-vs- Case No. 04CF000609

DANNY L. WILBER,

Defendant.

**COPY**

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CHARGE: First Degree Intentional Homicide While  
Armed with a Dangerous Weapon

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February 23, 2005  
Milwaukee, Wisconsin  
Safety Building-Room 316

BEFORE:

THE HONORABLE MARY M. KUHNMUENCH  
CIRCUIT JUDGE

APPEARANCES:

JAMES GRIFFIN, Assistant District Attorney,  
Appeared on behalf of the State of Wisconsin.

MICHAEL CHERNIN, Attorney-at-Law,  
Appeared on behalf of the defendant.

Defendant appeared in person.

Lori J. Cunico  
Official Court Reporter

I N D E X

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<u>EXHIBIT</u>	<u>MARKED</u>
64 - Polaroid Photo	21
65 - Toy Gun	25

1                   TRANSCRIPT OF PROCEEDINGS:

2                   THE COURT:   State of Wisconsin v.  
3                   Danny Wilber, 04CF000609, first degree  
4                   intentional homicide while armed with a  
5                   dangerous weapon.   Appearances please.

6                   ATTORNEY GRIFFIN:   Assistant DA  
7                   Jim Griffin for the State.

8                   ATTORNEY CHERNIN:   Michael  
9                   Chernin appearing on behalf of Danny Wilber,  
10                  who appears in person.

11                  THE COURT:   Good morning.   The  
12                  court notes that the jury has been  
13                  deliberating since approximately 8:40 this  
14                  morning, and they buzzed about five or ten  
15                  minutes ago indicating that they had reached a  
16                  verdict.   In that regard, prior to the verdict  
17                  being tendered to the court and the jury being  
18                  brought out, I want to make a record of the  
19                  request that came out of the jury room.   One  
20                  came out last night and one came out this  
21                  morning.   The request last night was for the  
22                  exhibits -- off the record.

23                  (Discussion off the record.)

24                  THE COURT:   Last night -- back on  
25                  the record.   Last night the -- the -- we had

1 to discharge the jury early, and that had to  
2 do with the fact that some of them had taken  
3 the bus and had left their cars at different  
4 park and ride lots. As a result of that, the  
5 last park and ride buses -- or the buses --  
6 the last time buses leave to go to the park  
7 and ride lots is at 5:48, I believe, and the  
8 jurors had already, because of the length of  
9 the afternoon proceedings and the closings,  
10 and when we finally sent the jury back it was  
11 about 20 after the hour of five, quarter  
12 after, 20 after the hour of five, the jurors  
13 had missed their -- six of the jurors had  
14 missed their buses.

15 As a result, the court made a  
16 call that we would not continue with  
17 deliberations, instead we would send the jury  
18 home try and secure transportation for them.  
19 In that regard my deputy, Tim Mooney, took the  
20 initiative to secure a prison transport bus  
21 from the Sheriff's Department and drove those  
22 six jurors securely back to their cars, which  
23 I think that whole process took Tim about --  
24 till about 8:00 o'clock last night. So I want  
25 to thank Deputy Mooney for that.

1                   In addition, I was advised by the  
2           chief judge, Michael Sullivan, at 7:30 last  
3           night that because of the current situation,  
4           with no parking available for jurors and no  
5           parking lots available, that all criminal  
6           courts have been advised or will be advised  
7           via e-mail that they are not to keep jurors  
8           past 5:00 p.m., so that they are able to  
9           secure their last bus home or to the park and  
10          ride lots from which they're parking. And to  
11          do so and to have enough time to be able to do  
12          that, we need to release them no later than  
13          5:00 o'clock.

14                   So deliberations in -- from what  
15          I guess from now until we hear otherwise,  
16          deliberations in criminal cases won't go  
17          beyond 5:00 p.m. We are going to stick or  
18          adhere to that directive until I hear  
19          otherwise.

20                   Finally, the jurors again asked  
21          this morning or reiterated their request of  
22          last night, which was to have the diagrams,  
23          the floor diagrams of the kitchen area that  
24          had been testified to in the -- during the  
25          trial. They had asked -- also asked for, this

1 morning, several photographs, all the  
2 photographs dealing with pictures that had the  
3 victim, Mr. David Diaz in them in the prone  
4 position after he had been shot. And they  
5 also asked for the pictures that Mr. Kohl had  
6 taken and that were received into the record  
7 as well. Those number 25, 15, 14, 1, 38, 39,  
8 28A, 36A, 24, 51, and then 56 through 63.  
9 Those were the exhibit numbers of the exhibits  
10 that I've just described and that were  
11 requested last night and this morning, and  
12 that were ultimately sent into the jury room  
13 as part of their deliberations.

14 At each point I advised counsel  
15 for both the State and the defense that this  
16 is the request that the jury did make and did  
17 either have an objection to those particular  
18 exhibits going into the jury room. And  
19 Mr. Griffin and Mr. Chernin both indicated to  
20 the court that they did not object to these  
21 exhibits going in.

22 Mr. Griffin, is that a correct  
23 restatement of the discussion of the exhibits  
24 that we talked about that ultimately went into  
25 the jury room?

1 ATTORNEY GRIFFIN: Yes.

2 THE COURT: Mr. Chernin, is that  
3 a correct restatement of the exhibits that we  
4 talked about that went into the jury room?

5 ATTORNEY CHERNIN: Yes ma'am.

6 THE COURT: With that, we were  
7 bringing the defendant out because we wanted  
8 to make the record of the possibility of any  
9 other exhibits going into the jury room, in  
10 what form, redacted form or not, particularly  
11 as it relates to the -- the reports, the --  
12 the police reports or statements that were  
13 taken from various witnesses. As we were  
14 preparing to do that and have the parties  
15 prepared to argue that to the court, we  
16 received a notice, as I said, ten minutes ago,  
17 that the jury had ultimately reached a  
18 verdict, so it became unnecessary for us to  
19 have that additional conference.

20 We're going to have the jury come  
21 out at this time.

22 ATTORNEY GRIFFIN: We are to  
23 remain seated?

24 THE COURT: That's correct.

25 ATTORNEY GRIFFIN: And, I'm

1       sorry, Judge, one more thing.  Whatever the  
2       verdict may be, I'm going to ask that you poll  
3       the jury by number.

4               THE COURT:  By number.  Carol, do  
5       you have the jury sheet?

6               DEPUTY:  Remain quiet for the  
7       jury please.

8               (Jury in box.)

9               THE COURT:  Please be seated.  
10       Members of the jury, have you  
11       selected a foreperson?

12              JURY:  Yes.

13              THE COURT:  And would the  
14       foreperson identify themselves by their jury  
15       number please.

16              FOREPERSON:  Number 14.

17              THE COURT:  Juror Number 14, is  
18       the -- has the jury reached a unanimous  
19       verdict?

20              FOREPERSON:  Yes.

21              THE COURT:  Have you tendered  
22       your verdict to the deputy?

23              FOREPERSON:  Yes.

24              THE COURT:  Deputy, do you have  
25       the tendered verdict?



1                   DEPUTY:   Yes.

2                   THE COURT:  Is this the unanimous  
3                   verdict of the jury?  Signify by saying 'aye.'

4                   JURORS:   Aye.

5                   THE COURT:  In the matter of  
6                   State of Wisconsin v. Danny Wilber, we the  
7                   jury, find the defendant, Danny Wilber, guilty  
8                   of first degree intentional homicide, as  
9                   charged in the Information.  If you find the  
10                  defendant guilty, you must answer the  
11                  following question, did the defendant commit  
12                  the crime while using a dangerous weapon?  
13                  Yes.  Dated this 23rd day of February, 2005,  
14                  at Milwaukee, Wisconsin, and signed by the  
15                  foreperson.

16                  Do I have a motion by either the  
17                  State or the defense?

18                  ATTORNEY CHERNIN:  Well, first  
19                  I'd seek to poll the jury, Your Honor.

20                  THE COURT:  Is that your  
21                  request?  Mr. Griffin, do you seek to have the  
22                  jury polled as well?

23                  ATTORNEY GRIFFIN:  I have no  
24                  objection.

25                  THE COURT:  Polling of the jury,

1 ladies and gentlemen, what that means is that  
2 my clerk is going to call each of you by your  
3 jury number. Do all of you remember your  
4 original jury number? She's going to call  
5 your jury number, and as she does she's going  
6 to ask you if this is in fact your verdict.  
7 You will respond in the affirmative if it is  
8 your verdict.

9 Madam Clerk.

10 THE CLERK: As to the charge of  
11 first degree intentional homicide while armed  
12 with a dangerous weapon, Juror Number 3, was  
13 this and is this now your verdict?

14 JUROR 3: Yes.

15 THE CLERK: Juror Number 4, was  
16 this and is this now your verdict?

17 JUROR 4: Yes.

18 THE CLERK: Juror Number 6, was  
19 this and is this now your verdict?

20 JUROR 6: Yes.

21 THE CLERK: Juror Number 10 was  
22 this and is this now your verdict?

23 JUROR 10: Yes. Yes.

24 THE CLERK: Juror Number 12, was  
25 this and is this now your verdict?

1 JUROR 12: Yes.

2 THE CLERK: Juror Number 13, was  
3 this and is this now your verdict?

4 JUROR 13: Yes.

5 THE CLERK: Juror Number 14, was  
6 this and is this now your verdict?

7 JUROR 14: Yes.

8 THE CLERK: Juror Number 16, was  
9 this and is this now your verdict?

10 JUROR 16: Yes.

11 THE CLERK: Juror Number 17, was  
12 this and is this now your verdict?

13 JUROR 17: Yes.

14 THE CLERK: Juror Number 19, was  
15 this and is this now your verdict?

16 JUROR 19: Yes.

17 THE CLERK: Juror Number 29, was  
18 this and this is now your verdict?

19 JUROR 29: Yes.

20 THE CLERK: Juror Number 32, was  
21 this and is this now your verdict?

22 JUROR 32: Yes.

23 THE COURT: The jury has been  
24 polled. Ladies and gentlemen of the jury, I  
25 want to thank you for your service to this

1 community, to the criminal justice system. I  
2 think as I told you right from the get-go, if  
3 we could not rely on good citizens like  
4 yourselves to come in at no small  
5 inconvenience to your lives, personally and  
6 professionally, and serve as jurors in these  
7 matters our criminal justice system would come  
8 to a screeching halt. And you have been just  
9 outstanding in your execution of your jury  
10 duties, both as to your patience during the  
11 deliberations, your coming back when the court  
12 directed you to come back, and a lot of the  
13 stop and goes that we had during the trial.  
14 No one faded from the -- from the duty or --  
15 all of you stood up like the good citizens  
16 that I knew you would be.

17 So I want to thank you on behalf  
18 of myself, my staff, all of us who work in and  
19 believe in the criminal justice system, you  
20 are now discharged as jurors in this matter.  
21 I'm going to have you return back to the jury  
22 room, you will remain back there until my take  
23 deputies you back down to Jury Management.

24 Thank you.

25 (Jury dismissed.)

1 THE COURT: Motions by the State?

2 ATTORNEY GRIFFIN: Motion for  
3 judgment on the verdict.

4 THE COURT: Motion by the  
5 defense?

6 ATTORNEY CHERNIN: I have two  
7 motions, Your Honor.

8 THE COURT: Go ahead.

9 ATTORNEY CHERNIN: One is for --  
10 I renew my motion for a mistrial based upon  
11 the status in which my client appeared before  
12 the jury on February 22nd. We did not have  
13 the opportunity to document that with a  
14 photograph. However, again, my client appears  
15 bound in a wheelchair with his hands shackled  
16 with a belly chain and handcuffs, he has  
17 restraint straps on his --

18 ATTORNEY GRIFFIN: I don't mean  
19 to interrupt, Mr. Chernin, I spoke with one of  
20 the sergeants here, there's a camera on the  
21 way now because of the late hour, I don't know  
22 if the court recalls, I said I would see if we  
23 could get a photograph. That way as opposed  
24 to describing it there can be a photograph put  
25 in the file for the record. And there is a

1 camera on the way, I believe it's a Polaroid,  
2 I believe Mr. Chernin will be able to look at  
3 the photograph before it's put in the file and  
4 agree that that's an accurate representation  
5 of how Mr. Wilber was seated here at the  
6 table, which I believe is consistent with the  
7 way he was yesterday, although he had a  
8 different shirt on.

9 ATTORNEY CHERNIN: Thank you,  
10 Mr. Griffin, and I concur, that is my motion,  
11 again, for a mistrial in that regard.

12 The second is for a judgment  
13 notwithstanding verdict in the matter. I  
14 think that the decision of the jury was  
15 against the greater weight of the evidence.

16 THE COURT: The court will grant  
17 the State's request to enter judgment on the  
18 verdict. I'm not going to take this out of  
19 the jury's hands at this time. I believe  
20 there was sufficient evidence in the trial  
21 record for them to reach the decision that  
22 they've made and I will not overturn their  
23 decision at this time. The court will deny  
24 the defense motion for a mistrial based on the  
25 defendant's appearance and deny their request

1       for a judgment notwithstanding the jury  
2       verdict.

3                       We will await the arrival of the  
4       camera so we can take a Polaroid of the  
5       defendant, which I believe will accurately  
6       depict the appearance of the defendant both  
7       yesterday and today, with the exception as  
8       noted of his shirt. He was wearing a  
9       different colored shirt yesterday. Off the  
10      record.

11                      (Discussion off the record.)

12                      THE COURT: In the interim the  
13      court's going to remand awaiting for  
14      sentencing. Is either side requesting a PSI?

15                      ATTORNEY GRIFFIN: The State is.

16                      THE COURT: Court is going to  
17      order a PSI. Where is the defendant being  
18      housed at this time?

19                      ATTORNEY CHERNIN: He's currently  
20      at Waupun.

21                      THE COURT: Will he be in Waupun  
22      for the next 30 or 60 days while this is being  
23      ordered?

24                      ATTORNEY CHERNIN: I would  
25      assume.

1 THE COURT: Is he serving a  
2 sentence up there?

3 ATTORNEY CHERNIN: He's serving a  
4 sentence, I assume they will send him back.

5 THE COURT: Court will order a  
6 presentence investigation. What that is,  
7 Mr. Wilber, is a probation agent is going to  
8 interview you, get background information  
9 about you, your family, your criminal history,  
10 your education and employment background, any  
11 mental or physical issues that you're dealing  
12 with. All of that's put into a written  
13 report, a copy of that will be tendered to the  
14 court, a copy will be given to the State and  
15 to your lawyer to share with you.

16 On the sentencing date I'll hear  
17 from the State, I'll hear from your lawyer,  
18 and I'll hear from a member of the victim's  
19 family, I'll hear from a member of your family  
20 if you so desire, and I'll have that  
21 presentence investigation report in my hands  
22 at that time as well. After I've heard from  
23 both sides, that's when I will sentence you.

24 THE CLERK: Did you want to pick  
25 a sentencing date, Judge?



1 THE COURT: Yeah, they can pick  
2 one.

3 (Discussion off the record.)

4 THE COURT: Take it from the  
5 front and the -- from the angle from where the  
6 juror box is.

7 ATTORNEY GRIFFIN: I'm sorry,  
8 where are they going to take the pictures  
9 from, Judge?

10 THE COURT: I want them to take a  
11 picture from the front.

12 ATTORNEY GRIFFIN: I'm going to  
13 ask one from the side, the way the jury would  
14 see it, over by the no smoke.

15 THE COURT: Okay. I just asked  
16 them. They have to take a side picture and a  
17 front picture.

18 ATTORNEY GRIFFIN: I'm sorry.

19 THE COURT: That's all right.  
20 They see him from the front there and then  
21 they'll see him as they come in from the angle  
22 there. From over on this side then too. Bob,  
23 over on this side over here.

24 THE CLERK: The first one didn't  
25 work, Judge, they're trying to take the front

1           one.

2                   ATTORNEY GRIFFIN: Judge, am I

3           excused?

4                   THE COURT: Yeah, you are.

5                   ATTORNEY GRIFFIN: April 22nd at

6           8:30?

7                   THE COURT: Did you pick a date?

8                   THE CLERK: I need you guys to

9           sign off on that stuff.

10                  THE COURT: Yeah, wait a minute.

11           We have to have you sign off on some of these

12           exhibits.

13                  ATTORNEY CHERNIN: Sign off on

14           what?

15                  THE COURT: Do you have the one

16           developed? Let me see the one developed in

17           that picture. Let me take a look at that.

18                  Mr. Griffin, Mr. Chernin, please

19           take a look at this photograph. If this is

20           the only one we're going to have, at least it

21           depicts what you've been describing.

22                  ATTORNEY GRIFFIN: Well, I'm

23           confused about this. If I may, Judge, can I?

24                  THE COURT: Go ahead.

25                  ATTORNEY GRIFFIN: It says that

1       it's a stipulation and order for return of  
2       exhibits. It says that exhibits are going to  
3       be returned to the offering party either  
4       immediately after the trial, which I don't  
5       think you're going to do, or within one year  
6       after time for appeal has expired. I know the  
7       court may order it, but is the -- is the court  
8       asking me if I agree with this by signing it  
9       or will I agree with it or must I sign it?

10               THE COURT: You must sign it.

11               ATTORNEY GRIFFIN: I must sign  
12       this?

13               THE COURT: Yep. That's the  
14       new -- it's a State form, and it's the new  
15       directive. My understanding is that this has  
16       been cleared through the District Attorney's  
17       Office as well. The Clerk's Office did this  
18       form up pursuant to discussion.

19               ATTORNEY GRIFFIN: So in like  
20       three years, for example, just as a  
21       hypothetical, I'm going to get a call, meaning  
22       my office, from the Clerk's Office and say,  
23       here's the Danny Wilber exhibits back?

24               THE COURT: Yep.

25               ATTORNEY GRIFFIN: And then those

1 things that were on inventory somehow have to  
2 go back to MPD or whatever or kept by the  
3 District Attorney?

4 THE COURT: Yes, because of the  
5 way it's --

6 ATTORNEY GRIFFIN: Can I just  
7 call Mark on this real quick?

8 THE COURT: Go ahead. I know  
9 they're aware of it because we had a judge's  
10 meeting on it and Mike Sullivan and the  
11 Clerk's Office said that the DA's, Carol White  
12 and everybody in the department were aware of  
13 it.

14 In addition, while we're waiting  
15 for that, the court has had a Polaroid  
16 photograph taken at an angle of the jury  
17 box -- off the record.

18 (Discussion off the record.)

19 THE COURT: Back on the record.  
20 At an angle of where the jury box is, I'm  
21 going to say within six feet of the defendant,  
22 where he is seated. And that is to depict  
23 the -- to have a record of -- an actual visual  
24 record, a picture record of the condition of  
25 which the defendant was in both yesterday

1           afternoon, which would have been February  
2           22nd, in the p.m., and then this morning,  
3           February 23rd, in the a.m., as a result of an  
4           earlier ruling that I had made in conjunction  
5           with my deputies in the Sheriff's Department  
6           concerning courtroom safety. That will be  
7           added to the file at this time for appellate  
8           purposes.

9                               (Discussion off the record.)

10                           THE COURT: With respect to the  
11           picture, we're going to label that photograph  
12           as Exhibit 64, is that correct, gentlemen,  
13           that Polaroid of the defendant?

14                           ATTORNEY GRIFFIN: Yes. And I  
15           will submit to your clerk pictures of that red  
16           plastic gun.

17                           (Exhibit Number 64 was marked for  
18           identification.)

19                           ATTORNEY GRIFFIN: And then the  
20           last thing I was going to ask the court, I  
21           don't know if -- what the court wants to do  
22           about Mr. Wilber's right shoe that was wore in  
23           trial that was used for demonstrative  
24           purposes, if that needs to be marked.

25                           THE COURT: It was never marked

1 as an exhibit or received into the trial  
2 record.

3 ATTORNEY GRIFFIN: Okay. I will  
4 submit those. And can we agree that the  
5 photograph of the red gun will be marked as  
6 Exhibit --

7 THE COURT: 65.

8 ATTORNEY GRIFFIN: -- 65?

9 THE COURT: Mr. Chernin?

10 ATTORNEY CHERNIN: Okay. Judge,  
11 Your Honor, what I -- with respect to this  
12 stipulation that we're asked to sign, what I  
13 indicated on my portion is I signed it, and I  
14 said that notice would be provided to  
15 appellate counsel. And so I'm going to -- I'd  
16 ask that at some point a copy of that be  
17 forwarded to me so that I can -- the notice of  
18 the intent to pursue post conviction relief, I  
19 can attach that to the document. And assuming  
20 that there are appeals in this matter, I would  
21 pass that on to whoever appellate counsel  
22 might be.

23 THE COURT: That's a fair  
24 request, it will be granted.

25 ATTORNEY CHERNIN: Thank you.

1 THE COURT: That's it. Let's  
2 take him down.

3 ATTORNEY GRIFFIN: Oh, sorry,  
4 Judge, one last thing I want to place on the  
5 record. The proper names for the different  
6 restraints that Mr. Wilber has are a RIPP  
7 belt, shoulder strap, leg iron and stun belt,  
8 which I believe is described as a bandy?

9 DEPUTY: Bandit.

10 ATTORNEY GRIFFIN: Oh, sorry, a  
11 bandit, which goes on the arm.

12 THE COURT: A stun band, which  
13 was on his arm, not on his waist, I think I  
14 made a record of that yesterday.

15 ATTORNEY GRIFFIN: I think you  
16 did. Those are the names that are used by law  
17 enforcement for these things. I think we were  
18 describing them as shoulder straps or  
19 something, and just that's the appropriate  
20 name.

21 THE COURT: All right. Thank  
22 you.

23 ATTORNEY CHERNIN: Judge, I'm  
24 sorry, the other thing that I didn't hear was  
25 the photographs that the court is making as

1 court exhibits, I assume for --

2 THE COURT: -- purposes of --  
3 appellate purposes, documenting the condition  
4 in which it was the basis for your request for  
5 a mistrial. Do you want me to label it  
6 something else?

7 ATTORNEY CHERNIN: No, I just was  
8 wondering what numbers --

9 THE COURT: 64 for that, and then  
10 Mr. Griffin had asked that he be allowed to  
11 have a Polaroid taken of the plastic gun that  
12 he had used, he described, I believe as a red  
13 plastic gun, it was a brownish red, rust  
14 colored gun that he had used. Again, it  
15 wasn't parked for evidence, it was used for  
16 demonstrative purposes, but he wants to take a  
17 picture of it for purposes of the record as  
18 well. And we would label that as 65.

19 Mr. Chernin, Mr. Griffin, do  
20 those numbers correlate to your records?

21 ATTORNEY GRIFFIN: Yes. The next  
22 exhibit number would be 65, whether it's going  
23 to be another photo of the defendant or the  
24 gun, what I'd simply do is send Mr. Chernin a  
25 letter with whatever number that clerk marks



1       that picture of the gun that I'll bring down  
2       today, and I'll notify Mr. Chernin of what  
3       that number is so he has it for his file.

4               THE COURT: Well, it's going to  
5       be 65. This right now is 64, the picture  
6       here, we're not going to take any more  
7       pictures, that one's done. 65 is the -- is  
8       the gun picture. So we're concluded with  
9       these ceremonies.

10              (Exhibit Number 65 to be marked  
11       for identification.)

12              (Discussion off the record.)

13              THE COURT: Mr. Griffin and  
14       Mr. Chernin, did you turn in your jury lists?

15              ATTORNEY GRIFFIN: Yes, I did  
16       that a long time ago.

17              ATTORNEY CHERNIN: We did that.

18              THE COURT: Both jury lists have  
19       been turned in? I'm going to order the jury  
20       list be sealed. Jury lists are ordered  
21       sealed.

22              The next court date is April 22nd  
23       at 8:30.

24              (End of proceedings.)

25

1 STATE OF WISCONSIN )

2

3 MILWAUKEE COUNTY )

4

5 I, Lori J. Cunico, do hereby certify

6 that I am a Registered Professional Reporter,

7 that as such I recorded the foregoing

8 proceedings, later transcribed by me, and that

9 it is true and correct to the best of my

10 abilities.

11

12 Dated this 24<sup>th</sup> day of October, 2005, at

13 Milwaukee, Wisconsin.

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17 Lori J. Cunico - Court Reporter

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